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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TINA SHENK, an individual, Plaintiff, vs. AETNA LIFE INSURANCE COMPANY and DOES 1-10, inclusive, Defendants.	Case No. CV17-02787 **COMPLAINT FOR:** **BREACH OF PLAN (RECOVERY OF PLAN BENEFITS)**

1. Plaintiff TINA SHENK ("Plaintiff") complains and alleges:

INTRODUCTORY ALLEGATIONS

2. This Court's jurisdiction is invoked pursuant to 29 U.S.C. § 1132(e). Plaintiff's claims arise under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. Alternatively, Plaintiff's claims arise in part under ERISA and in part under state law claims falling within the pendent or supplemental jurisdiction of this Court, deriving from a common nucleus of operative facts.

3. Venue is properly within the Central District of California pursuant to

29 U.S.C. § 1132(e)(2), because the acts complained of have occurred within this District, because Defendant resides in or may be found within this district, and because the ends of justice so require.

4. Furthermore, this case is related to Case No. CV-14-08077-DSF (JPRx), *Shenk v. Aetna Life Insurance Co.* ("*Shenk I*"), previously filed by Plaintiff.

5. This action seeks damages for the denial of disability benefits under a group disability policy ("the Plan") established by Plaintiff's employer, Bank of America ("BofA"), and funded and administered by Defendant Aetna Life Insurance Company ("Aetna").

6. Plaintiff seeks benefits, attorneys' fees and costs, and other appropriate relief for the improper, erroneous and illegal denial of disability benefits owed to Plaintiff, a participant and beneficiary of the Plan.

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THE PARTIES AND THEIR RELATIONSHIPS

7. Plaintiff is, and at all times herein mentioned was, a resident and citizen of the State of California, County of Los Angeles. At all relevant times, Plaintiff was a participant and beneficiary of the Plan.

8. At all relevant times, the Plan was a group benefit plan that provided Plaintiff with protection against the risk of disability. Plaintiff was an employee of BofA and was enrolled at all relevant times in the Plan.

9. The Plan that is the subject of this action is and was an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1) sponsored by and established by BofA for the purpose of providing peace of mind and security to its participants in the event that, among other things, a participant or beneficiary of the Plan should suffer disability.

10. Aetna is an insurance company authorized and licensed to conduct, and is indeed conducting, the business of insurance in the State of California.

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Plaintiff is informed and believes, and thereon alleges, that Aetna is a corporation domiciled in State of Connecticut, with its principal place of business in the State of California, County of Los Angeles.

FIRST CAUSE OF ACTION

FOR BREACH OF PLAN AND RECOVERY OF PLAN BENEFITS

(Against All Defendants)

11. The allegations contained in all previous paragraphs are incorporated herein by reference as though set forth in full.

12. The disability Plan established by BofA was funded and administered by Aetna, Plan Number 0811383.

13. Plaintiff paid all premiums due for the disability coverage under the Plan.

14. The Plan promises to pay disability benefits of 60% of the employee's pre-disability income in the event of disability.

15. The Plan promises to pay benefits until at least age 67.

16. Plaintiff's date of birth is May 11, 1972.

17. On or about April 30, 2012, Plaintiff started working for BofA as a Business Support Manager earning a base salary of $95,000. A BofA Business Support Manager's responsibilities include managing diverse administrative functions such as financial control/budgeting, personnel processes, audit/compliance, associate training, service quality, process improvement, business continuity or communication. In addition, a Business Support Manager is responsible for acting as the primary interface with the Attorney General's Office, Senator's Office, OCC, FNMA, Treasury and Executives to establish all connectivity between the organizations. Amongst the required skills, a Business Support Manager must be a self-starter, who is solution oriented, detail oriented, able to multi-task and who has excellent written communication and presentation

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skills as well as good research, analytical, and problem-solving skills.

18. The Plan promises to pay disability benefits of 60% of the employee's pre-disability income in the event of disability or approximately $5,380 per month.

19. In or about August 2012, Plaintiff began developing health problems.

20. By May 2013, Plaintiff's medical condition worsened to the point where Michael Hirt, M.D., determined that Plaintiff must stop working. He certified Plaintiff's disability to Aetna.

21. On or about May 7, 2013, Plaintiff became totally disabled under the terms of the Plan. She was diagnosed, in part, with Chronic Epstein-Barr Virus Syndrome, Chronic Inflammatory Response Syndrome, Chronic Fatigue Syndrome, Encephalopathy, Irritable Bowel Syndrome, and Hypoadrenal Syndrome.

22. Plaintiff's symptoms include severe fatigue, cognitive impairment, short-term memory loss, inability to concentrate, post-exertional malaise lasting more than 24 hours, severe headaches, sleep disturbance, visual difficulties, fainting/dizziness, muscle aches, joint pain, abdominal pain, nausea, diarrhea, constipation, shortness of breath, respiratory abnormalities, and hypotension. As a result of her medical conditions and the symptoms she suffers due to those medical conditions, Plaintiff is totally disabled from not only her own, but any occupation.

23. Plaintiff became totally disabled under the terms of the Plan.

24. Plaintiff applied and was approved for California State Disability benefits.

25. Aetna used Elana Mendelssohn to review the file to generate a report for its denial, even though she is not a doctor.

26. Aetna denied Plaintiff's short-term disability claim on or about October 22, 2013.

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27. Aetna denied Plaintiff's long-term disability claim on or about November 5, 2013.

28. On or about March 28, 2014, Steven Castellon, M.D., conducted neuropsychological testing of Plaintiff to determine if any cognitive defects were present from a neurological perspective. Dr. Castellon did find such defects. Dr. Castellon notes that studies support that the most likely cause of the detected and reported cognitive compromise is Chronic Fatigue Syndrome (CFS) and Epstein Barr Virus (EBV) and that the finding of sustained attention deficits and retrieval and learning problems with Plaintiff is entirely consistent with studies of CFS patients. He further notes that Plaintiff meets the DSM-5 criteria for 331.83, Mild Neurocognitive Disorder, due to multiple etiologies, with the main presumed etiologies to be EBV and CFS. Lastly, based on the testing he performed, Dr. Castellon opines that Plaintiff is incapable of performing the material duties of her occupation due to cognitive impairment.

29. Plaintiff appealed the denial on or about April 22, 2014.

30. On or about July 24, 2014, Dr. Hirt wrote that he had noted a "slow cognitive decline" of Plaintiff and that Plaintiff had "severe memory retention issues." Dr. Hirt wrote that Plaintiff's disability is not psychiatric but "medical in nature." Dr. Hirt also wrote that Plaintiff suffers from Epstein Barr.

31. On or about August 20, 2014, Aetna denied the appeal.

32. Aetna has never had Plaintiff evaluated by any of its physicians. Every doctor who has ever seen Plaintiff has concluded that she is unable to work and totally disabled from her occupation and any occupation for which she is reasonably suited in light of her education, training, and experience.

33. Plaintiff's condition is permanent and stationary.

34. The Plan required payment of benefits within the jurisdiction of the above-entitled Court for a total amount to be shown at the time of trial.

35. The Plan was entered into within the jurisdiction of the above-entitled

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Court.

36. The Plan calls for performance within the jurisdiction of the above-entitled Court.

37. Plaintiff has pursued and exhausted all administrative appeals, which the Plan and Defendant denied.

38. In *Shenk I*, the parties settled the short-term disability ("STD") disability benefits and agreed that the consideration of Plaintiff's long-term disability ("LTD") benefits would be remanded back to Aetna for further consideration. The parties did not settle the issue of the LTD benefits. The Court, in light of the settlement, dismissed the case on November 6, 2015.

39. Subsequent to the Judgment, Plaintiff has continually sought to obtain benefits in accordance with the parties' agreement. Aetna refused to pay any LTD benefits.

40. On October 6, 2015, Aetna wrote a letter directly to Plaintiff regarding her claim, despite the fact that Aetna had been notified not to contact Plaintiff directly since she was represented by counsel.

41. On October 7, 2015, Plaintiff's counsel wrote a letter to Aetna asking about the status of the claim. Aetna did not respond.

42. On November 20, 2015, Plaintiff's counsel wrote Aetna a letter again asking about the status of the claim.

43. On December 2, 2015, Aetna wrote a letter to Plaintiff's counsel stating that Aetna had "initiated our reconsideration review of Ms. Shenk's" claim.

44. Plaintiff's counsel spoke with Aetna on the phone regarding this claim on December 16, 2015. On December 16, 2015, Plaintiff's counsel sent Aetna all of the documents regarding the claim. Also on December 16, 2015, Plaintiff's counsel sent Aetna an authorization form as Aetna had requested.

45. On December 18, 2015, Aetna faxed Plaintiff's counsel an Attending Physician Statement form.

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46. On January 19, 2016, Plaintiff's counsel sent Aetna the completed forms that Aetna had requested on December 17, 2015: an authorization and a Supplemental Information Questionnaire.

47. On February 26, 2016, Aetna wrote Plaintiff's counsel a letter regarding the claim. Plaintiff's counsel responded to Aetna's letter in writing on March 8, 2016.

48. On February 26, 2016, Aetna requested a copy of Plaintiff's driver's license. Plaintiff's counsel sent it to Aetna on that same day.

49. On March 10, 2016, Plaintiff's counsel received an email from Dr. Hirt's office that Aetna had obtained the records from Dr. Hirt's office. Plaintiff's counsel emailed Aetna later that day to advise Aetna of that fact. On March 11, 2016, Aetna emailed Plaintiff's counsel to confirm that Aetna had indeed obtained those records.

50. On March 10, 2016, ReleasePoint sent Plaintiff's counsel a fax requesting that Plaintiff sign an authorization for records from South Bay Family Medical Group. On March 16, 2016, Plaintiff's counsel returned the signed authorization for South Bay Family Medical Group to Aetna and ReleasePoint.

51. On April 1, 2016, Aetna sent a request for Plaintiff to complete an Attending Physician Statement and a Capabilities and Limitations Worksheet.

52. On April 13, 2016, Plaintiff's counsel sent Aetna completed copies of the Attending Physician Statement and Capabilities and Limitations Worksheet.

53. On April 28, 2016, Aetna sent another copy of the Attending Physician Statement and the Capabilities and Limitations Worksheet. The completed versions of these forms had previously been provided to Aetna on April 13, 2016.

54. On May 2, 2016, Plaintiff's counsel sent Aetna an email asking if Aetna needed any further forms. Aetna responded by email on May 3, 2016, stating that the requested forms had been received.

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55. On June 3, 2016, Plaintiff's counsel wrote to Aetna asking the status of the claim. Plaintiff's counsel did not receive a response to this letter.

56. On June 10, 2016, Plaintiff's counsel received a letter from Aetna dated June 2, 2016, requesting an authorization for records related to Anthem Blue Cross. The letter did not include the requested authorization. On June 13, 2016, Plaintiff's counsel wrote a letter to Aetna stating that Plaintiff's counsel had not yet received any request for a signed authorization for Anthem Blue Cross records. On June 15, 2016, Plaintiff's counsel received a request for a signed authorization from ReleasePoint for Blue Cross records. On June 16, 2016, Plaintiff's counsel faxed the requested signed authorization back to Aetna and ReleasePoint.

57. On July 26, 2016, Plaintiff's counsel wrote an exhaustive letter to Aetna detailing how it had failed to timely consider Plaintiff's claim for benefits commencing in November 2013. None of the new records in 2016 had a bearing on Plaintiff's state of disability in 2013. Aetna should have made a decision within the statutorily-mandated deadlines. It failed to do so.

58. On August 8, 2016, Aetna denied the claim and paid nothing on the LTD benefits that were owed as of November 5, 2013.

59. On December 18, 2016, Michael Hirt, M.D., provided an updated report explaining why Plaintiff was totally disabled.

60. Every form and authorization that has been requested by Aetna has been promptly returned by Plaintiff.

61. Aetna had Plaintiff's medical records for years. There was no reason to refuse to pay Plaintiff's claim from November 5, 2013, to the present. The presence of additional records for subsequent time periods does not excuse Aetna's duty to make a determination by the deadline set forth in the regulations. Aetna had more than enough time to obtain all of the records—especially for the 2013 benefits.

62. Under the regulations promulgated by the Secretary of Labor that

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govern this claim, Aetna had 45 days to make a decision on this claim. An additional 45 days could have been requested by Aetna prior to the expiration of the first 45 days, but no such request was made by Aetna.

63. Aetna thus had 45 days from at the latest October 7, 2015, the date that Plaintiff's counsel wrote to Aetna regarding the status of the claim The claim consideration deadlines apply after remand by Court to the administrator. 29 C.F.R. § 2560.503-1(i)(3). Therefore, the deadline under the regulations to make a determination on this claim expired long before Aetna issued its denial on August 8, 2016.

64. In Dr. Hirt's December 18, 2016, report, he responds to the August 8, 2016, denial letter:

> Contrary to the statements by Aetna reviewers that there is no objective data supporting these diagnoses, Ms. Shenk has continued to have abnormal inflammation testing including C4A, TGF-beta 1, and CD57 levels all of which, have been clearly documented in her chart and have been repeated numerous times. These fluctuating or persistently abnormal inflammatory and disease markers correlate with the patient's symptomatology and this has been clearly documented in her medical record. For example, in August 2013, Ms. Shenk's level was 19,664 with the upper limit of the reference range being 2,830. This clearly indicates a severe level of chronic inflammation, which generated the diagnosis of Chronic Inflammatory Response Syndrome complicated by polyarthritis, myalgias, fatigue, and multisymptom encephalopathy. The patient also has been diagnosed with recurrent Epstein Barr viral infection, which contributes to the severity of her chronic fatigue syndrome. These tests have also been repeated numerous times and clearly indicate a chronic and recurrent viral infection.

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> Having had the opportunity to observe and treat Ms. Shenk for more than four years, I am confident in my capacity as a treating physician to declare that she is totally permanently disabled and unable to perform any regular gainful employment due to the multitude of medical diagnosis and symptomatology that prohibit her from being a reliable employee and employee who can exert the effort required for gainful employment and her inability to endure the effort and stresses of even sedentary office work.

65. Plaintiff timely appealed the denial of her claim on January 23, 2017.

66. On February 2, 2017, Aetna acknowledged receipt of the appeal.

67. On March 9, 2017, Aetna denied the appeal.

68. Aetna has never paid any LTD benefits to Plaintiff.

69. Plaintiff remains disabled from her occupation and any occupation for which she is reasonably suited in light of her training, education, and experience.

70. Plaintiff has pursued and exhausted all administrative appeals, which the Plan and Defendant denied.

71. As a direct and proximate result of Defendant’s refusal to honor the terms of the Plan, Plaintiff has suffered contractual damages under the and other incidental damages and out-of-pocket expenses, including attorney fees and costs, all in a sum to be determined at the time of trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For benefits payable under the Plan to reimburse Plaintiff, a beneficiary and participant of the Plan, less amounts previously paid, plus interest;

2. For reasonable attorneys’ fees and costs pursuant to 29 U.S.C. § 1132(g)(1);

3. For pre-judgment interest at the appropriate rate; and

4. For such other relief as the court deems appropriate.

Dated: April 12, 2017

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By:______________________________

Christian J. Garris, Esq.

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